IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6701 OF 2004

Shri Pandu Kalu Kuwar ... Petitioner

v/s

Shri Ukhiba V. Aher and ors. ... Respondents

Mr Vishwanath Talkute for Petitioner.

Ms Smita Mane for Respondent No.1.

CORAM : D.K. DESHMUKH J.

DATE : 24TH AUGUST 2005.

P.C. :-

1. By this petition, the petitioner challenges the order dated 16th June 2004 passed by the Additional District Judge, Nashik below Exh.1 in civil miscellaneous application No.334 of 1998. Civil miscellaneous application No.334 of 1998 was filed for readmission of appeal No.244 of 1994 which was dismissed by the Court for default on 29th November 1997. That appeal was filed by one Kalu who was father of the present petitioner. It is admitted fact that that appeal was filed on behalf of Kalu by his power of attorney holder viz. Yeshwant, who is present respondent No.2. Kalu admittedly died on 28th August 1996. No application for bringing legal heirs of deceased Kalu was made within the time allowed by law. Therefore, the Court dismissed the appeal on 29th November 1997. It appears that an application was moved for restoration of the appeal. That application was dismissed for default on 10th March 2000. The petitioner thereafter moved an application for recalling the earlier order dated 10th March 2000. That application was rejected by the Court by order dated 25th February 2002 and the application for restoration itself was dismissed. Against that order, writ petition No.2241 of 2003 was filed in this Court. In that

petition, it was stated that the application for setting aside abatement after the death of Kalu was not filed because the petitioner and the respondents were unaware of the pendency of the litigation. The exact averments are found in paragraph II(e) of the petition which read as under :-

> "(e). Being aggrieved by the aforesaid judgment and decree, the petitioner's father viz. Kalu had preferred an appeal bearing No.244 of 1994 on 30.4.1994 before the District Judge, Nashik. The petitioner states that on 30.4.1994 the learned District Judge was pleased to admit the appeal and issued notices to the respondents and called for record and proceedings. The petitioner states that the petitioner's father had filed the said appeal through Advocate Shri S.K. Shinde. The petitioner states that the petitioner's father was looking after the litigations pertaining to the suit property. The petitioner and the respondent Nos.2 to 4 were unaware of the status and position of the legal proceedings initiated and conducted by their father. The petitioner states that on 28.8.1996, the petitioner's father died. The petitioner states that the petitioner's father

was exclusively looking after the litigation. Therefore, the petitioner and other brother were not aware about the status of the litigation. The petitioner states that on 25.3.1998 for the first time the petitioner came to know that the appeal filed by his father came to be dismissed for default on 20.11.1997. The said order of dismissal came to the petitioner when he received a notice in execution proceedings initiated by he respondent No.1. On 26.3.1998 the petitioner had applied for the certified copy of the said order and the same was received on 8.6.1998. Thereafter on 20.7.1998 the petitioner filed an application bearing No.334 of 1998 under Order 41 Rule 19 of Civil Procedure Code for restoration of the said appeal. Annexed hereto and marked as Exh.'A' is the copy of the said application dated 20.7.1997."

. The above quoted averments are patently false because the appeal was filed on the basis of power of attorney executed by Kalu in favour of Yeshwant who was respondent No.2 in the petition and therefore, the contention that Kalu was looking after the litigation is false. Similarly, the statement that the respondent Nos.2 to 4 were unaware about the litigation is also

false because it is respondent No.2 - Yeshwant who had in fact filed the appeal as power of attorney holder of Kalu. Writ petition No.2241 of 2003 came to be disposed off by this Court by order dated 23rd February 2004. It appears from the order that the Court accepted the case pleaded by the petitioner that he was unaware of the appeal which was filed by his father and it was his father who was looking after the litigation. The Court, in the order, observed that the petitioner has stated in paragraph II of the petition that he was unaware of the legal proceedings which were looked after personally by his father during his life time. The Court has set aside the order dated 23rd February 2002 and directed the appeal Court to decide the application for restoration on merits. That application has been decided by the appeal Court by its order which is impugned in this petition.

2. Perusal of miscellaneous application No.334 of 1998 shows that though there is an application made for restoration of the appeal, there is no prayer for setting aside the abatement of the appeal nor is there any effort made for bringing legal representatives of deceased appellant on record. The only method sanctioned by law by which appeal could have been restored was firstly by setting aside the abatement of the appeal, the legal representatives of the deceased

appellant could have been brought on record and thereafter the legal representatives could have made an application for restoration of appeal. But that course of action has not been taken. The appeal has been dismissed in November 1997, dismissal of the appeal obviously creates rights in favour of the respondents. Those rights cannot be lightly interfered with and taken away. The rights that have accrued to the respondents can be disturbed only if the applicant satisfies the Court that he has made efforts with due diligence. I do not find any patent illegality in the order impugned. The petition therefore fails and is rejected. However, in my opinion, mere rejection of the petition will not be enough. During the course of hearing of this petition, I have found that in writ petition No.2241 of 2003, the petitioner - Pandu has made statements which are patently false and on the basis of those statements, he procured an order from this Court. The conduct of the petitioner of making patently false statements in order to mislead this Court prima facie amounts criminal contempt of the Court. Therefore, in my opinion, a show cause notice is liable to be issued to the petitioner to show cause why he should not be prosecuted and punished for having committed criminal contempt of the Court. While issuing show cause notice to the petitioner, a copy of this order be enclosed with the petition. Show cause notice be made returnable after a period of two

weeks from the date of its issue. After the service of show cause notice, matter be placed before the appropriate Division Bench for further consideration.

. Parties to act on the copy of this order duly authenticated by the Sheristedar / Personal Secretary of this Court as true copy.

. Certified copy expedited.